(2)

Supreme Court, U.S.
FILED
OCT 30 1995
CLERK

No. 95-515

In The

Supreme Court of the United States

October Term, 1995

THE JONES-BLAIR CO. and THE O'BRIEN CORPORATION,

Petitioners,

vs.

THE HARDAGE STEERING COMMITTEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH N. McKINNEY
Counsel of Record
ROBERT L. ROARK
McKINNEY, STRINGER & WEBSTER, P.C.
Attorneys for Respondents
101 North Broadway
Oklahoma City, Oklahoma 73102
(405) 239-6444

7499
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

13pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the district court acted within its discretion, and did not clearly err, when it made factual findings, based on disputed evidence, that Petitioners had entered into enforceable settlements with Respondent.

II. Whether the district court acted within its discretion, and did not clearly err, when it denied Petitioners' motion for recusal, based on its determination that Petitioners had failed to show that a reasonable person, knowing all relevant facts, would harbor doubts about the judge's impartiality.

LIST OF PARTIES

Petitioners have incorrectly identified the individual parties comprising the Respondent, Hardage Steering Committee ("HSC"), by including several named Defendants who are not members of this unincorporated association of potentially responsible parties at the Hardage Superfund Site. The following list shows each member company and its related entities as required by Sup. Ct. R. 26.1. As authorized by the court clerk, this list includes parent companies and subsidiaries which are publicly traded and incorporated in the United States. A listing of related companies which are not publicly traded, or which are incorporated outside the United States, will be made available as directed, if necessary.

HARDAGE STEERING COMMITTEE PARTIES AND LIST OF NON-WHOLLY OWNED SUSIDIARIES

HSC Member:	Parent or Non-Wholly-Owned Subsidiary:
Advance Chemical Distribution, Inc.	
AlliedSignal Inc.	
American Telephone & Telegraph Company	AT&T Capital Corporation AT&T Credit Corporation NCR Corporation
Ashland Oil, Inc.	Ashland, Inc. A. B. & H. Processing, Inc. ACS Coal Sales Company, Inc. AECOM Technoloy Corporation Allegheny Land Company Allegheny Land Company No. 2

Ashland Oil, Inc. (Continued)

American Science & Engineering Company
Apogee Coal Co.
Arch Coal Sales Company, Inc.
Arch International, Inc.
Arch Mineral Corporation
Arch of Wyoming, Inc.
Architectural Interiors, Inc.
Ark Land Company
Ashland Coal Sales (Ohio), Inc.
Ashland Coal, Inc.
Ashland Terminal, Inc.
Associated Design Planning & Art, Inc.
ATC Architecture, Inc.
ATC Engineering Consultants, Inc.
ATC Engineering, Inc.
ATC Services, Inc.
Bebe Coal Corporation
Big Sandy Terminal, Inc.
Cardon-Southwest Co.
Catenary Coal Company
Catenary Coal Holdings, Inc.
Coal-Mac, Inc.
Coalstream Pipeline Company, Inc.
Consoer Townsend Harris International, Inc.
Consoer, Townsend & Associates of Michigan, Inc.
Consoer Townsend & Associates of Ohio, Inc.
Consoer Townsend & Associates, Inc.

Ashland Oil, Inc. (Continued)

Cumberland River Coal Company
Dal-Tex Coal Corporation
Daniel, Mahn Johnson & Mendenhall
DMJM
DMJM Agrisystems
DMJM Architects & Engineers, Inc.
DMJM Architects P.C.
DMJM Arizona, Inc.
DMJM De Lationamerica Y El Caribe
DMJM International
DMJM-Phillips, Reister, Haley, Inc.
DMJM/CD
DMJM, Inc.
DMJM, P.C.
Drennen Tipple Corporation
East West Energy Company
Energy Development Co.
Filbeth Enterprises, Inc.
Frederic R. Harris Engineering Corporation
Frederic R. Harris, Inc.
Global Consultants, Inc.
Gravcap, Inc.
Great Lakes Coal & Dock
GSAS Architects Planners, Inc.
Hobet Mining, Inc.
Holmes & Narver Constructors, Inc.
Holmes & Narver Continental, Inc.
Holmes & Narver International, Inc.
Holmes & Narver Services, Inc.
Holmes & Narver, Inc.

Ashland Oil, Inc. (Continued)

Julian Tipple, Inc.
LA Grange Oil Terminal Company
Locap Inc.
Logicomp Corporation
Lone Mountain Processing, Inc.
Loop Inc.
Melamine Chemicals, Inc.
Mexico Engineering & Services, Inc.
Mingo Logan Coal Company
Minnesota Pipe Line Company
Mountain Gem Land No. 2, Inc.
Mountain Gem Land, Inc.
Mountain Mining, Inc.
Mountaineer Land Company
Mountaineer Land Company No. 2
Old Hickory Coal Company
P.C. Holding Inc.
P & D Technololgies, Inc.
R&H Service and Supply Co.
Real Estate Resources, a DMJM Affiliate
Resource Sciences Corporation, THE
Saarcar Coal, Inc.
Servco, Inc.
Sharples Coal Corporation
South Point Ethanol
Sunven Partners Limited Partnership
Technical Management Services, Inc.
Technical Resources, Inc.

Ashland Oil, Inc. (Continued)	
	Tecumseh Pipe Line Company
	THSI Contractors, Inc.
	Tri State Terminals, Inc.
	Uhl & Lopez, Inc.
	United States Coal Company
	Vosbeck/DMJM Architects & Engineers, Inc.
	Williams Brothers Engineering Venezuela, Inc.
	701 Associates Limited Partnership
Atlantic Richfield Company	Alyeska Pipeline Service Company
	Arco Chemical Company
	Badger Pipeline Company
	Colonial Pipeline Company
	Cook Inlet Pipe Line Company
	Dixie Pipeline Company
	East Heidelberg Salt Water Disposal Co.
	East Texas Salt Water Disposal Co.
	Kuparuk Transportation Capital Corp.
	Kuparuk Transportation Company
	Logan Aluminum Inc.
	Lyondell Petrochemical Company
	Olympic Pipe Line Company
	Platte Pipe Line Company
	Prince William Sound Oil Spill Response Corporation
	Tecumseh Pipe Line Company
	Texas-New Mexico Pipe Line Company
	Vastar Resources Inc.

Borg-Warner Automotive, Inc.	
Bridgestone/Firestone,Inc. f/k/a Firestone Tire & Rubber Company	Bridgestone Corporation
Bull HN Information	Bull Data Systems, Inc.
Coltec Industries Inc.	Garlock Bearings Inc.
Exxon Corporation	
GenCorp Inc.	
Macklanburg-Duncan Company	
Maremont Corporation	Arvin Industries, Inc.
McDonnell Douglas Corporation	Finnish American International Trade, Inc. Network Information Service Co., Ltd.
Mobil Chemical Company, Inc	Mobil Oil Corporation Mobil Corporation
Nalco Chemical Company	
Oklahoma Gas and Electric Co.	
Oklahoma Publishing Company	
PPG Industries, Inc.	
Rockwell International Corporation	Rockwell Software, Inc.

Seagate Technology, Inc. (successor In Interest to Magnetic Peripherals, Inc.)	
Texaco Refining and Marketing, Inc.	Texaco, Inc. StarrStaff, Inc. Texwood L.C.
Texas Instruments Incorporated UOP Inc.	
Uniroyal Goodrich Tire Company, Inc.	The Uniroyal Goodrich Tire Company
Webco Industries, Inc.	
Westinghouse Electric Corporation	Powerex, Inc. Remotec, Inc. Rocky Mount Town Centre Associates, Limited Partnership Safe Sites of Colorado L.L.C. Corporate Interiors, Inc. Knoll Europe B.V. Gregory Environmental Systems, L.P. Wb Bottling Corporation Mojave Cogeneration Company, L.P. Harbinger Edi Services, Inc. Comware Systems, Inc. Pittsburgh Baseball Jerry Thompson & Associates, Inc. Holland Manufacturing

Weyerhaeuser Company	Pacific Veneer, Ltd.
	Cedar River Paper Co.
	Mountain Tree Farm Co.
	North Pacific Paper Co. (NORPAC)
W.O.L. Corporation	

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	x
Table of Citations	xi
Statutes Involved	1
Statement of the Case	1
Summary of Argument	8
Reasons for Denying the Writ	11
I. Petitioners' Questions Presented for Review Misstate the Issues Actually Presented to and Decided by the Court of Appeals and District Court.	11
II. No Important Questions of Federal Law Are Presented by the Petition for Writ of Certiorari.	14
A. The District Court's Denial of Petitioners' Motion to Recuse Did Not Constitute an Abuse of Its Discretion.	14
B. The District Court Did Not Clearly Err When It Enforced the Settlement Agreements Between Petitioners and the HSC.	16
Conclusion	19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Liteky v. United States, __ U.S. __, 114 S. Ct. 1147 (1994) 10, 15, 16

Phillips v. Joint Legislative Committee, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, *reh. denied*, 457 U.S. 1140, *reh. denied*, 458 U.S. 1116 12

Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985) 12

Salve Regina College v. Russell, 499 U.S. 225 (1991) 16, 17

United States v. Colorado and Eastern Ry. Co., 50 F.3d 1530 (10th Cir. 1994) 14, 15

United States v. Hardage, 982 F.2d 1491 (10th Cir. 1993) 5, 15, 16, 17

Statutes Cited:

28 U.S.C. § 455 15

42 U.S.C. § 9606 1

42 U.S.C. § 9607(a)(4)(A) 1

Contents

Page

Rules Cited:

Supreme Court Rule 10 ..... 8, 9

Supreme Court Rule 14.1(a) 11

APPENDIX

Appendix I — Additional Statutes Involved in the Case .. 1a

Appendix II — Excerpted Deposition of Robert Roark Dated September 23, 1993 ..... 3a

Appendix III — Excerpted Transcript of Hearing Dated December 21, 1993 ..... 6a

Appendix IV — Motion for Recusal Filed February 25, 1993 ..... 32a

STATUTES INVOLVED

In addition to the citations provided in Petitioners' Petition for Writ of Certiorari, Respondent has listed statutory and regulatory provisions which are involved in the merits of this case in Appendix I. These provisions will be relevant to the fact issues before this Court if it determines to exercise its discretionary jurisdiction and issue a Writ of Certiorari in this matter. Since they are only relevant to fact issues which were decided by the district court, however, they are not pertinent to the arguments contained in this Brief.

STATEMENT OF THE CASE

On June 25, 1986, the United States filed this lawsuit seeking an injunction under Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606, to compel the named defendants, including the Hardage Steering Committee ("HSC"), to implement a government-developed remedy at the Hardage Superfund site located near Criner, Oklahoma. The federal government also sought, pursuant to CERCLA Section 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), to recover the costs it had incurred and would incur in the future to investigate and monitor conditions at the Hardage site. Jones-Blair Company ("Jones-Blair") and The O'Brien Corporation ("O'Brien") had been identified by the government as potentially responsible parties at the Hardage site, but were not named defendants in the June 25, 1986 Complaint because they had previously entered into a court approved *de minimis* settlement with the government covering its response costs.

On May 22, 1987, the HSC sued Jones-Blair and O'Brien, with more than 100 other third-party defendants, for their share of the costs the HSC incurred independently of the government to develop the Hardage site remedy ultimately selected by the

district court over the government's proposed remedy. On November 28, 1990, the district court found that Jones-Blair and O'Brien were liable under CERCLA as generators of hazardous substances at the Hardage site.[1] The district court scheduled a trial date of March 25, 1991, to determine the amount of response costs owed HSC by all remaining parties, including Jones-Blair, O'Brien and additional third-party defendant Cook Paint and Varnish Company ("Cook Paint"), who was not a *de minimis* settler with the government.

Prior to the scheduled trial date of March 25, 1991, the HSC presented an offer of settlement to the *de minimis* third-party defendants, including Jones-Blair and O'Brien. The proposed settlement required each *de minimis* third-party defendant to pay the HSC one dollar per gallon of waste contributed to the Hardage site, less certain credits. This amounted to $24,825 for Jones-Blair, and $43,022 for O'Brien. This offer of settlement remained pending until it was accepted and put into effect as described below.

On March 22, 1991, Petitioners' counsel of record, Timothy L. Harker, who also represented Cook Paint, sent a letter to J. William Conger, court-appointed liaison counsel for the third-party defendants. The letter informed Conger that Jones-Blair and O'Brien would settle with the HSC for its $1 per gallon offer if Cook Paint also settled, and that Cook Paint would settle or not based on the decision of its insurance counsel who would be present in court on March 25, 1991. Harker's letter confirmed that Conger would apprise the HSC of Cook Paint's, Jones-Blair's and O'Brien's positions in time for settlements to occur to avoid trial. [Petition, App. G, 38a-39a]. Copies of this letter

1. In spite of having paid substantial sums to settle the government's response cost claims under the *de minimis* Consent Decree, Jones-Blair and O'Brien both denied they were liable parties under CERCLA, thereby forcing the HSC to establish their liability by summary judgment.

were sent to client representatives of each of the four companies identified therein whom Harker represented. *Id.* [2]

On Monday, March 25, 1991, the district court ordered a two-day continuance of the previously-scheduled trial to afford the several remaining parties (more than those involved here) an additional opportunity to settle their respective claims. By Wednesday morning March 27, 1991, all other parties except Cook Paint, Jones-Blair and O'Brien had reached settlements or stipulations with the HSC which would avoid a long, complex, costly trial. Cook Paint and the HSC asked for and were granted additional time that morning to attempt to settle the HSC's claims.

During these settlement discussions, the HSC made it clear that due to the cost of trial it would settle with Cook Paint for a reduced amount only if Jones-Blair and O'Brien also settled by accepting the HSC's outstanding offer of one dollar per gallon, since only in this way could HSC avoid the expense of a complex trial. Based on the Harker March 22, 1991 letter, which Conger and Chris Condren, local counsel for Cook Paint, had a copy of, Cook Paint reached agreement with the HSC and thereby committed Jones-Blair and O'Brien to accept the HSC's *de minimis* settlement offer. [App. III, 23a-24a].

Upon being informed of the facts leading up to the settlements between Cook Paint Jones-Blair, O'Brien and the HSC, the district court judge concluded that enforceable agreements had been reached, and called counsel for the parties into his chambers for an on-the-record discussion. Judge West read into the record the contents of the Harker March 22, 1991

---

2. Harker also represented Reliance Universal, a *de minimis* party who also accepted HSC's one dollar per gallon offer, and is not involved in this dispute.

letter, then asked Conger, liaison counsel for Cook Paint, Jones-Blair and O'Brien, to state his "understanding of the terms and conditions having been complied with." [Petition, App. F, 33a]. Conger's response was as follows:

> Your honor, in light of the statement by Ms. Bunn on behalf of Cook Paint, it seems to me that all of the protocols and requirements set forth in Mr. Harker's letter are performed and therefore, that the settlement should go through on behalf of O'Brien and Jones-Blair, pursuant to the instructions of this letter.

Id. at 33a-34a. Condren, counsel for Cook Paint, stated that his client believed it had settled the HSC's claims against it and was avoiding the costs associated with a CERCLA response cost trial. *Id.* at 34a. At this point, Judge West stated:

> The Court agrees with that and has advised Mr. Schulcz that it intends to enforce the settlement with regard to Jones-Blair and other clients in accordance with that. But I also want to allow him an opportunity to make a statement into the record.

Id. After Schulcz stated his position, Judge West noted:

> All right. As the Court has previously announced, it's my opinion that the terms and protocols and conditions have been complied with; that Mr. Conger is authorized to settle the case on that basis.
>
> The Court will enforce the settlement in that regard.

> In addition to that, there is a practical matter that I feel obligated to state. The Court is not about to undertake a trial of this magnitude and size on behalf of two diminimis (sic) parties. Costs would very quickly exceed any amount in controversy as between them and certainly exceed any differences in their positions now from the time that was stated.

Id. at 35a.

Jones-Blair and O'Brien appealed the district court's enforcement of their settlements with the HSC to the Tenth Circuit Court of Appeals. In *United States v. Hardage*, 982 F.2d 1491 (10th Cir. 1993), the appellate court reiterated the district court's inherent power to enforce settlement agreements between litigants but concluded the district court should have conducted a full blown evidentiary hearing on the events leading up to the settlement since Jones-Blair and O'Brien were disputing the facts. The Court of Appeals remanded the case to the district court for an evidentiary hearing "to resolve the dispute of whether [Jones-Blair and O'Brien] and HSC validly entered into a settlement agreement." *Hardage*, 982 F.2d at 1496-97. In complying with the remand, the district court was assigned a task for which it is inherently better-suited than any appellate court, including this Honorable Court — namely, the weighing of conflicting evidence to determine fact issues presented to it for resolution.

Prior to the hearing conducted by the trial court on remand, Petitioners filed a motion seeking recusal by the trial judge on grounds that his impartiality was questionable, based on his prior ruling in 1991 regarding the settlement, as well as earlier rulings in the case in which he found against Jones-Blair's and O'Brien's attempt to claim defenses based on their *de minimis* settlement

with the government. [App. IV, 33a-36a.] After being fully briefed, the court denied this motion under the applicable standards. [Petition, App. A, 1a-2a].

At the evidentiary hearing conducted on remand on December 21, 1993, evidence was presented to determine the following key facts:

1. The HSC presented an offer to Jones-Blair and O'Brien to settle its respective claims against them prior to March 22, 1991. [App. II, Roark Deposition, 5a ("There was a *de minimis* offer that had been on the table for months and months."); App. III, Harker testimony, 26a-27a ("there was a global settlement offer on the street from the Hardage Steering Committee for the *de minimis* parties of a dollar a gallon . . .")].

2. The Harker March 22, 1991 letter laid out the terms by which Jones-Blair and O'Brien would accept the HSC's offer, *i.e.*, they would settle if and when Cook Paint settled with the HSC. [App. III, Conger testimony, 8a-10a; Condren testimony, 22a-23a; Harker testimony 27a].

3. Neither Harker, as the principal attorney representing Jones-Blair and O'Brien, nor Schulcz, as Harker's associate at the scene of settlement negotiations, ever informed Conger, Condren or the HSC of any change in settlement position which departed from the terms of the Harker March 22, 1991 letter, until the morning of trial on March 27, 1991. [App. III, Conger testimony, 11a-12a, 13a-15a, 16a-17a; Condren testimony, 20a-21a; Harker testimony, 28a-31a].

4. The settlements between the HSC and Jones-Blair and O'Brien became effective when Cook Paint settled on March 27, 1991, before Conger, Condren or the HSC knew of any change in settlement position. [App. III, Conger testimony, 17a, 18a-19a; Condren testimony, 23a-24a, 25a].

5. Cook Paint relied on the position stated in the Harker March 22, 1991 letter when it settled with the HSC on the morning of March 27, 1991. [App. III, Condren testimony, 26a].

After hearing all of the evidence offered by Jones-Blair, O'Brien and the HSC, judging the credibility and demeanor of the witnesses, reviewing the relevant exhibits offered by all parties, and studying the briefs submitted by both sides, Judge West entered detailed findings of fact and conclusions of law in which he found, *inter alia*:

* * *

> 3. Indeed, the evidence presented at the hearing confirms and strengthens the Court's opinion that the letter of March 22, 1991, authorized the settlements that the court enforced. Neither the authority given to Conger nor Jones-Blair's or O'Brien's offer of settlement as outlined in the letter was withdrawn, countermanded or modified by anyone prior to the time the condition in the letter — Cook Paint's settlement with the HSC — had occurred. And, once Cook Paint settled with the HSC, settlements between the HSC and Jones-Blair and O'Brien were effected.

[Petition, App. B, 10a].

In its Order and Judgment filed on May 5, 1995, the Tenth Circuit Court of Appeals affirmed the district court's judgment finding the parties entered into a settlement agreement and enforcing the settlements between the parties. The Court of Appeals also concluded the district court did not abuse its

discretion in denying Jones-Blair's and O'Brien's motion to recuse. [Petition, App. C]. Petitioners' subsequent petition for rehearing and suggestion for rehearing en banc was denied on June 28, 1995. [Petition, App. D].

SUMMARY OF ARGUMENT

The controversies presented by Jones-Blair's and O'Brien's Petition are based solely on factual findings of the district court, and are not issues which warrant this Court's discretionary jurisdiction. The May 5, 1995 Order and Judgment of the United States Court of Appeals for the Tenth Circuit [Petition, App. C, 12a-18a] clearly states that the district court *did not commit reversible error* when it (1) concluded that the parties entered into a settlement agreement and (2) enforced the settlement agreement. Additionally, the appellate court concluded that the district court *did not abuse its discretion* by denying Jones-Blair's and O'Brien's motion to recuse.

These fact issue determinations, which were squarely within the province of the trial judge in his inherently advantageous position to evaluate the credibility of the witnesses and weigh the testimony and other evidence presented by the parties, and which were affirmed at the appellate court level, are rarely, if ever, appropriate for this Court's review. *See* Sup. Ct. R. 10.[3] This is, simply put, a plain, ordinary, vanilla contract dispute involving disputed facts. There are no federal constitutional or statutory

---

3. The August 1, 1995 amendment to this Court's Rule 10, which became effective on October 2, 1995, reflects the long-standing practice of this Court in determining whether to exercise its discretionary jurisdiction.

* * *

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

interests involved in this case, nor any other "compelling reasons" to grant jurisdiction.

Jones-Blair's and O'Brien's Petition for Writ of Certiorari is a transparent attempt to transform Petitioners' dissatisfaction with fact-intensive decisions, fairly reached and affirmed in the courts below, into the "creation of a new federal law of settlement" which "negates state law and constitutional due process." [Petition at i]. Reference to Sup. Ct. R. 10, Considerations Governing Review on Writ of Certiorari, is noticeably absent from Jones-Blair's and O'Brien's Petition. Instead, in a last ditch effort to gain the attention of the highest court in the land, they contend they were denied "their day in court" despite the fact they have spent the last four-and-a-half *years* in continuous, litigious attempts to undo the district court's decision to enforce their combined settlement — a settlement involving only $68,000.

They further seek to elevate the level of importance of this case by attempting to raise issues of fairness and attacking the impartiality of the trial judge. Placed in its proper context, Petitioners' argument is predicated on their dissatisfaction with the way the trial judge chose to manage his docket, the exercise of his discretion on the merits of the claims which Jones-Blair and O'Brien repeatedly raised in the trial court, and ultimately on the contention he could not appear fair because prior to remand he had ruled in favor of the HSC on the settlement agreement issue.

It is obvious that the district judge did not abuse his discretion by denying Jones-Blair's and O'Brien's motion to recuse. The Court of Appeals had the full benefit of all the arguments and case authority which Jones-Blair and O'Brien were able to muster in support of their contention that Judge West's refusal to step down from this case was an abuse of his discretion. The conclusion reached by the appellate court, that

Judge West *did not abuse his discretion* by denying Jones-Blair's and O'Brien's motion to recuse, is squarely in line with this Court's holding and reasoning concerning the extra-judicial source doctrine in *Liteky v. United States*, __ U.S.__ , 114 S. Ct. 1147 (1994).

Similarly, on the issue of enforcement of the settlement agreement, it is obvious from the evidence presented to the district court that it did not clearly err. At the evidentiary hearing conducted on December 21, 1993, the live testimony of four witnesses, including Petitioners' counsel of record and one of his associates, and the deposition testimony of four other witnesses, all subject to vigorous cross-examination, were part of the record upon which the district court based its decision that Jones-Blair and O'Brien reached valid settlements with the HSC pursuant to Oklahoma contract law. The appellate court, in affirming the conclusions reached by the district court, likewise had the full benefit of all the arguments and case authority which Jones-Blair and O'Brien were able to muster in support of their contention that enforceable settlements had not been reached.

In their original brief to the Tenth Circuit, Jones-Blair and O'Brien *made no contention* whatsoever that the district court improperly created "a new federal settlement rule." Rather, they repeatedly argued only that the federal district court sitting in Oklahoma failed to correctly interpret and apply Oklahoma law to the facts. The new twist Petitioners give this case, *i.e.*, creation of a "new federal rule of settlement," was made only after the Tenth Circuit affirmed the district court's decision. Nowhere in the Tenth Circuit's opinion, however, nor for that matter the district court's judgment, did either court even allude to, implicitly or explicitly, a "new *federal* rule of settlement". The conclusions reached by the appellate court, that Judge West *did not commit reversible error* by (1) concluding that the parties

entered into a settlement agreement and (2) enforcing that settlement agreement [Petition, App. C, 18a], should be accorded the finality they deserve.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' QUESTIONS PRESENTED FOR REVIEW MISSTATE THE ISSUES ACTUALLY PRESENTED TO AND DECIDED BY THE COURT OF APPEALS AND DISTRICT COURT.

Disregarding the directive of Sup. Ct. R. 14.1(a) that questions presented for review be "short and concise" and not "argumentative or repetitious," Petitioners have devoted the full measure of the page allotted to them to present three lengthy, argumentative questions which assume facts not supported by the record and which were not even decided by the appellate court. This Court should not be enticed by these misstatements of the issues presented below to exercise its discretionary jurisdiction.

Stripped of their improper components, Petitioners' "questions" present to this Court nothing more than a request for review of (i) fact issue determinations wholly within the purview of the district judge and (ii) a determination wholly within the sound discretion of the district judge concerning recusal, both of which have already been reviewed properly by the Court of Appeals. It is clear that these are not proper issues for the exercise of this Court's discretionary jurisdiction, despite Petitioners' overreaching attempts to cast the "questions presented" as presenting weighty issues worthy of yet a third level of consideration. In cases such as this, it is appropriate for this Court to decline to exercise its jurisdiction. *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 513, n. 10, 88

L. Ed. 2d 523 (1985) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."); *Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 971, *reh. denied*, 457 U.S. 1140, *reh. denied*, 458 U.S. 1116 (recusal is committed to district judge's sound discretion, thereby limiting scope of review).

Petitioners' first "question" contains superfluous and incorrect statements which ignore the factual sequence of events that occurred on the record before the district judge on the morning of March 27, 1991. It is not correct, as Petitioners assert, that no party asked Judge West to determine that Petitioners had settled with the HSC. It is clear from the transcript of proceedings that Conger, as liaison counsel for the third-party defendants, including Jones-Blair and O'Brien, stated that their settlements with the HSC should be enforced. [Petition, App. F, 33a-34a]. Counsel for Cook Paint also urged that Cook Paint's settlement with the HSC bound Jones-Blair and O'Brien to the settlement terms of the Harker March 22, 1991 letter. [App. III, Condren testimony, 26a]. As discussed further below, it is also apparent from a cursory reading of the transcript that Petitioners have taken out of context Judge West's comments about the impracticalities of a lengthy, complex trial. [Petition, App. F, 34a-35a].

More importantly, this "question" as phrased by Petitioners does not even state a legally cognizable issue which this Court could address if it chose to exercise its discretionary jurisdiction. The issue which was presented to the appellate court, which it properly decided [Petition, App. C, 18a], and which the HSC contends is the true "question" Petitioners should have presented to this Court, is whether the district court *abused its discretion* (not whether the trial court properly reflected the "appearance of

justice") in denying Jones-Blair's and O'Brien's motion for recusal.

Petitioners' second and third "questions" are likewise improper. Having failed to convince the courts below they were wrong in the way they applied Oklahoma's law of contracts to the facts of this case, Jones-Blair and O'Brien have resorted to the contention that the district and appellate courts have totally disregarded Oklahoma law, and have fashioned "a new federal law of settlement" which impermissibly "negates state law and constitutional due process." [Petition at i].

The second and third "questions" also contain incorrect statements which ignore the sequence of events that occurred on the record. The second "question" posed by Petitioners contains no less than four subparts which are nothing more than disputed fact issues determined by the trial court. As shown in Respondent's Statement of the Case, *supra,* three of these fact issues as phrased by Petitioners are simply wrong. It is not correct, as Petitioners assert, that Conger was "the one person" authorized to settle on Petitioners' behalf. Indeed, Harker's own letter gave Cook Paint a determinative role in the settlement negotiations. [Petition, App. G, 38a]. It is also incorrect to state there was no evidence to support the district court's finding that the criteria for contract formation had been met, or that the district court "ignored" Petitioners' right to rescind or revoke their settlements. As demonstrated herein, there was, in fact, sufficient evidence from which the district court could determine that an enforceable agreement had been reached under Oklahoma law, which was not and could not be rescinded or revoked by Petitioners' counsel. The fact Petitioners disagree with the district court's factual determinations does not entitle them to assert here that there was no evidence to support their position.

II.

NO IMPORTANT QUESTIONS OF FEDERAL LAW ARE PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI.

A. The District Court's Denial of Petitioners' Motion to Recuse Did Not Constitute an Abuse of Its Discretion.

At the on-the-record meeting in Judge West's chambers on March 27, 1991, the district judge explicitly stated that the "terms and protocols" of the conditional acceptance stated in the Harker 3/22/91 letter had been met, thereby resulting in settlements between Jones-Blair and O'Brien and the HSC. [Petition, App. F, 34a, 35a]. It was only *after* Judge West had twice stated this basis for his decision to enforce the settlements (once on the record, and once prior thereto), that he made the practical observation which has become the centerpiece of Jones-Blair's and O'Brien's Petition. Judge West's comments about the impracticality of a trial were carefully prefaced with the statement that places his remarks in their proper context: *"In addition to* that, there is a *practical matter* that I feel obligated to state." [Petition, App. F, 35a]. This judicial comment obviously did not state the determinative basis for the district court's decision to enforce the settlements between Petitioners and the HSC.[4]

---

4. The additional grounds for their appeal on the recusal issue (rulings on various motions) are equally unpersuasive. As part of their argument in support of recusal [Petition at 10] Jones-Blair and O'Brien have asserted, incorrectly, that part of the denial of their "day in court" occurred as a result of the district court's refusal to recognize the CERCLA "contribution protection" as a shield from the HSC's independent response cost claims. Jones-Blair and O'Brien misinterpret, if not misstate, the Tenth Circuit's decision in *United States v. Colorado and Eastern Ry. Co.*, 50 F.3d 1530 (10th Cir. 1994) which they cite in support of their recusal argument in footnote 1 on page 10 of their Petition. In *Colorado and Eastern Ry. Co.*, the court clearly recognizes that a

(Cont'd)

This Court's recent, definitive pronouncements on the issue of recusal conclusively support the district court's denial of Petitioners' motion. Despite the fact they cite *Liteky v. United States*, __ U.S. __, 114 S. Ct. 1147 (1994) in their Petition [Petition at 9, 12], Jones-Blair and O'Brien have studiously ignored its application of the "extrajudicial source" doctrine to the federal recusal statute, 28 U.S.C. § 455. The various grounds Petitioners have offered to support their contention that Judge West abused his discretion in denying their motion to recuse are strikingly similar to those which were rejected by this Court in Liteky: "judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel . . ." *Liteky*, 114 S. Ct. at 1158. As the Court noted:

> All [these grounds for recusal] occurred in the course of judicial proceedings, and neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible.

Id. At best, Petitioners' arguments concerning the basis for the district court's rulings are proper grounds for appeal on the merits, not recusal. If, as they contend, no enforceable

---

(Cont'd)

CERCLA responsible party who has settled its liability to the federal government is *only* shielded by contribution protection for "matters addressed" within the settlement. *Id.*, 50 F.3d at 1537. The settling party is not, however, shielded from the independent response costs incurred by another responsible party. *Id.* at 1539. This is precisely the law of the case in *Hardage*, and the very reason why the trial court's consistent denial of Jones-Blair's and O'Brien's repeated attempts to reassert their contribution protection defense was correct. In any event, this appeal by Jones-Blair and O'Brien does not involve the issue of contribution protection, nor was it ever ripe for decision by the Tenth Circuit in the *Hardage* case.

settlements were reached with the HSC on the morning of March 27, 1991, their proper avenue for redress is appeal from the adverse ruling. *See Liteky,* 114 S. Ct. at 1157 ("Almost invariably, [judicial rulings] are proper grounds for appeal, not for recusal."). There is, therefore, no basis for reviewing the Court of Appeals' decision on this issue.

B. The District Court Did Not Clearly Err When It Enforced the Settlement Agreements Between Petitioners and the HSC.

As explained in the Statement of the Case, *supra* at 6-7, the district court had before it sufficient evidence on which to base its decision that Petitioners and the HSC had entered into enforceable settlements pursuant to Oklahoma law. When the Court of Appeals remanded this case to the district court for the purpose of conducting the evidentiary hearing which was held on December 21, 1993, it informed the parties that its review of the district court's decision of whether an enforceable settlement had occurred would be based on an abuse of discretion standard. *United States v. Hardage,* 982 F.2d 1491, 1495 (10th Cir. 1993). Subsequently, the appellate court specifically indicated in its opinion affirming the district court's decision that it reviewed the district court's conclusions of law de novo, and its findings of fact for clear error. [Petition, App. C, 17a-18a].

The standard of review employed by the Court of Appeals is consistent with this Court's guidance in *Salve Regina College v. Russell,* 499 U.S. 225 (1991). In that case, the Court held that the trial court's findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Deferential review of mixed questions of law and fact is warranted when the district court is better positioned than the appellate court to decide the issue in question or that probing legal scrutiny will not

contribute to the clarity of legal doctrine. *Id.* at 233 (citations omitted).

In this case, the district court was able to judge the credibility of the witnesses and carefully weigh the evidence presented to it, exercising its proper function in a way which the Court of Appeals or this Court is inherently unable to do on appeal. In *Salve Regina,* the district court was faced with the purely legal issue of whether the commercial doctrine of substantial performance should apply in an academic setting under Rhode Island law. *Id.* at 229. Since there was no fact question, or even a mixed question of fact and law, to be reviewed, this Court was not reluctant to examine the lower court's ruling. Here, however, only disputed fact questions are involved. Obviously, the Court of Appeals did not "forget" this Court's guidance in *Salve Regina,* as Petitioners contend. [Petition at 15] They have failed to cite any authority which establishes a standard of review other than abuse of discretion, or clear error, when a district court has enforced a settlement.

When this matter was remanded by the Court of Appeals to the district court, it was for the purpose of determining whether, as a matter of fact, the HSC and Petitioners entered into a valid settlement agreement. *Hardage,* 982 F.2d at 1496-97. Necessarily included in this determination were questions such as:

1. What was the interpretation of the Harker March 22, 1991 letter by Conger and Condren?

2. What was the effect of the Harker March 22, 1991 letter as construed by Conger and Condren?

3. Did Jones-Blair's and O'Brien's counsel revoke or countermand the instructions in the Harker March 22, 1991

letter to Conger prior to a settlement being reached with the HSC?

4. Did Conger reasonably believe he had authority to facilitate a settlement with the HSC on March 27, 1991?

5. Did Conger, Condren and the HSC rely upon the authority granted by the Harker March 22, 1991 letter, and, if so, did they change their positions as a result?

6. At what point in time were agreements reached between Cook Paint and the HSC, and Jones-Blair and O'Brien and the HSC on March 27, 1991?

7. Was counsel for Jones-Blair and O'Brien legally entitled to rescind or repudiate the settlement after it was already made, and if so did he effectively do so?

8. What weight and credibility should be afforded the witnesses and other evidence presented?

Rather than recognize, as they should, that the district court simply did not believe Petitioner's evidence on these disputed fact issues, Petitioners contend the district court must have decided to create "a new federal law of settlement that negates state law." [Petition at i]. But there is clearly no reference to such a "federal law of settlement" in either the district court's judgment or the Court of Appeals' opinion. There is only a detailed analysis of conflicting evidence and the application of elementary principles of Oklahoma contract law to those facts. As hard as Petitioners might try to recast the issues in this case as involving federal questions or constitutional due process, this Court should reject that false implication. Jones-Blair's and

O'Brien's second and third "questions for review" are totally inappropriate for the exercise of the Court's discretionary jurisdiction.

CONCLUSION

Petitioners have not presented the Court with any colorable basis for exercising its discretionary jurisdiction in this matter. The "questions presented" in the Petition amount to nothing more than ill-disguised fact issues and determinations wholly within the sound discretion of the trial judge, which were properly reviewed and affirmed by the Court of Appeals. There are no important questions of federal law presented by the Petition, nor any other compelling reasons for exercising jurisdiction. For these reasons, the HSC respectfully requests that the Petition be denied.

Respectfully submitted,

KENNETH N. McKINNEY
Counsel of Record
ROBERT L. ROARK
McKINNEY, STRINGER &
WEBSTER, P.C.
Attorneys for Respondent
101 North Broadway
Oklahoma City, Oklahoma 73102
(405) 239-6444

APPENDIX I — ADDITIONAL STATUTES INVOLVED IN THE CASE

Okla. Stat. tit. 15, § 68 (1991):

> If a prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted.

Okla. Stat. tit. 15, § 69 (1991):

> Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to [Section 68 of this title].

Okla. Stat. tit. 5, Ch. 1, App. 3-A, Rules of Professional Conduct:

> Rule 1.7. Conflict of Interest: General Rule
>
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> >
> > (2) each client consents after consultation.

Appendix I

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

APPENDIX II — EXCERPTED DEPOSITION OF ROBERT ROARK DATED SEPTEMBER 23, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

C-86-1401-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROYAL N. HARDAGE, et. al.,

Defendants,

ADVANCE CHEMICAL COMPANY, et. al.,

Hardage Steering Comittee
Defendants and Third-Party
Plaintiffs,

ABCO, INC., et. al.,

Third-Party Defendants.

* * * * * *

DEPOSITION OF ROBERT ROARK
TAKEN ON BEHALF OF
JONES BLAIR COMPANY AND O'BRIEN CORPORATION
ON SEPTEMBER 23, 1993
IN OKLAHOMA CITY, OKLAHOMA

* * * * * *

Appendix II

APPEARANCES

For the Hardage Steering	Mr. Robert D. Tomlinson McKinney, Stringer & Webster City Center Building Main and Broadway Oklahoma City, Oklahoma 73102
For Jones Blair Company and O'Brien Corporation:	Mr. Mitch Blackburn Hastie and Kirschner 3000 First Oklahoma Tower 210 W. Park Avenue Oklahoma City, Oklahoma 73102
Reported By:	Vicki Maltsberger, CSR, CP, CM MERIT REPORTERS, INC. Suite 807, Two Leadership Sq. Oklahoma City, Oklahoma 73102 (405) 232-2804

* * *

[20] for the continuance; that we needed Monday and Tuesday to get some of those things put to bed.

So I think as of Friday the 22nd when the letter was sent, there was not a global agreement with the major defendants. At that point in time, there was definitely going to be a full-blown two- or three-week cost trial and liability trial is my recollection.

Q. Well, then, on March 22nd of '91 when the letter was sent, what were they conditionally agreeing to accept in the way of a settlement? Do you know?

Appendix II

MR. TOMLINSON: Are you asking him what they were thinking?

THE WITNESS: What who was agreeing to?

Q. (By Mr. Blackburn) Jones-Blair and O'Brien. Are you aware? Were they responding to an agreement that was on the table?

A. All right. You are getting the global — I think you are getting the global settlement confused with the the de minimis settlement.

Q. Okay.

A. There was a de minimis offer that had been on the table for months and months. And that offer on the table was basically that the de minimis parties would each pay a dollar per gallon for their volume of waste. And that they would receive against that number credit for 70 percent of [21] any sums that they may have paid the HSC while they were members of the HSC. Some of those parties had previously been members of the HSC and got out. They had paid some assessments during the time they were members.

The agreement was they would pay a dollar, less credit for 70 percent of any assessments they had paid the HSC.

Yes, that offer was a firm offer. It had been on the table. We had had some acceptances trickle in during the month prior to trial. And that had been the offer that applied to Jones-Blair and O'Brien.

* * *

APPENDIX III — EXCERPTED TRANSCRIPT OF HEARING DATED DECEMBER 21, 1993

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Docket No. C-86-1401-W

Oklahoma City, Oklahoma

December 21, 1993

UNITED STATES OF AMERICA,

Plaintiff,

V.

ROYAL N. HARDAGE, ET AL,

Defendants,

ADVANCE CHEMICAL COMPANY, ET AL.,

Hardage Steering Defendants
and Third-Party Plaintiffs,

v.

ABCO, INC., et al.,

Third-Party Defendants.

Appendix III

TRANSCRIPT OF HEARING DECEMBER 21, 1993 BEFORE THE HONORABLE LEE R. WEST UNITED STATES DISTRICT JUDGE

[2] A-P-P-E-A-R-A-N-C-E-S

Appearing for the Jones-Blair Company and The O'Brien Corporation:	Mitchell D. Blackburn Attorney at Law Oklahoma City, OK
Appearing for the Hardage Steering Committee:	Robert L. Roark Attorney at Law Oklahoma City, OK
Court Reporter	Lynn L. Hilton 3001 U.S. Courthouse Oklahoma City, OK 73102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[Testimony of J. William Conger
Direct examination by Mr. Roark]

[14] Q. As between Mr. Harker and Mr. Schulcz, who was the more senior attorney or lead attorney in that relationship, according to your perception?

Appendix III

A. My perception was that Tim Harker was.

Q. Did most of your instructions initially come from Mr. Harker in that regard?

A. Yeah, I can say that.

Q. Do you recall who initiated that phone call on the 22nd?

A. Mr. Harker did.

Q. Can you tell us briefly, as best you can recall, what the substance of the conversation was?

A. Yes. We talked about the status of the settlement negotiations and he indicated to me that Akzo — I believe I'm saying that name right — wanted to settle; that Jones-Blair and O'Brien would settle if Cook Paint settled.

During that time, in that week, Cook Paint was — which wanted to settle — was engaging in negotiations with their carrier. That was their impediment to their ability to settle.

Q. Do you recall whether or not he explained the rationale as to why Jones-Blair and O'Brien wanted to tie their fate to Cook Paint?

A. Yes.

Q. What was that?

A. Well, his position was that-if Cook Paint was not able to settle and that Cook Paint was going to proceed to trial, that [15] it was

his view that it would be appropriate for Jones-Blair and O'Brien to proceed to trial with Cook Paint. The economics would support them going forward in trial, their positions were basically the same, their legal positions.

Q. In terms of bearing the cost of going forward, as between Jones-Blair and O'Brien and Cook Paint, who was the biggest party bearing the biggest brunt of that cost?

A. Cook Paint.

Q. That conversation was followed up by a letter from Mr. Harker; is that correct?

A. That's true.

Q. I have handed you what is marked as Plaintiffs' Exhibit 1. Can you identify that for the Court, please?

A. This is the letter that I received by FAX from Mr. Harker on the 22nd.

MR. ROARK: I would offer Plaintiffs' Exhibit 1 at this time.

MR. BLACKBURN: (No response.)

THE COURT: Without objection, it will be admitted.

Q. Did you receive this by telefax the very same day you had your telephone call?

A. I believe that's right.

Appendix III

Q. When you received the letter, Mr. Conger, was there any doubt in your mind about the intent or the effect of this letter?

[16] A. No.

Q. This is consistently the telephone conversation that you just described?

A. Precisely. It just confirmed what he had told me by telephone.

Q. Go to Monday, March 25th.

A. Okay.

Q. First of all, over the weekend on the 23rd or 24th, did anything occur in the way of a settlement between Cook Paint and the HSC which would make this letter become effective?

A. No.

Q. On Monday, at that point in time, were negotiations still ongoing —

A. Yes.

Q. — among several of the parties left in the case?

A. Yes.

Q. At that point, am I correct, Mr. Conger, that virtually all of the other third-party defendants and major defendants in the case had reached an agreement with the HSC, at least as of Monday — strike that, let me start that over.

Appendix III

On Monday, the 25th, the parties appeared before Judge West, did they not?

A. They did.

Q. At that point in time, the Court granted a continuance for a couple of days so that some final negotiations among the HSC

* * *

[18] A. Yes, of course.

Q. You, personally, what kind of schedule and activities were you engaged in during those two days?

A. Well, we were — we had a plate full. We were working long hours. And as I say, I was constantly involved, either in preparing for trial, or working with the rest of the settlements and being kept advised of the status of those.

Q. Did you have conversations with Mr. Schulcz from time to time during the days of March 25th and March 26th?

A. Yes.

Q. Did the subject of this letter, Plaintiffs' Exhibit 1, ever come up during any conversation that you had with Mr. Schulcz on those two days?

A. Absolutely not.

Q. Do you recall any conversation with Mr. Schulcz, Mr. Conger, in which he discussed the settlement positions of Jones-

Appendix III

Blair and O'Brien and Cook Paint, such that it would constitute a change in the instructions that are contained in this Exhibit 1?

A. No, sir, I did not.

Q. You testified with certainty that no such conversation occurred?

A. Right.

Q. How can you be so sure that that did not occur?

A. Well, I mean I think that if this letter had been [19] repudiated in any way or I had been led to believe that it was being repudiated, I would recall that and I would have done something about it.

Q. Would that have been an important development to you in getting ready for trial on those two days such that you would have reacted to it?

A. Sure, it would.

Q. As a practical matter, it came down to the fact that actually only these three parties were left; is that true?

A. That's right.

Q. So of all the parties, were you interested mostly in the positions of these three parties at that point in time?

A. Yes, they were the only ones left.

Appendix III

Q. Tell us what Mr. Chris Condren's role was from your side of the table during those two days? First of all, he is an attorney here in Oklahoma City, correct?

A. Yes, he is.

Q. Whom did he represent?

A. He represented Cook Paint, the carrier had tendered the defense and that was his capacity.

Q. Did he also have a role in the third-party liaison executive committee that more or less managed the side of your litigation?

A. He was the chairman of our committee.

Q. He was very active in the case on behalf of his clients; [20] is that a fair statement?

A. And on behalf of all other third parties in that capacity, yes.

Q. Did you advise Mr. Condren of the existence of this letter, Plaintiffs' Exhibit 1, sometime on Monday, the 25th or Tuesday, the 26th?

A. Yes, I did. I don't recall specifically when I advised him, but it was during that week.

Q. You did discuss the letter with him, tell him what it said?

A. Yes. He knew, as did everyone, what the position was. I had communicated the position, as I understood it, that if Cook Paint settles the case, Jones-Blair and O'Brien would settle.

Appendix III

Q. Did you have a conversation with Mr. Tim Harker on Tuesday March 26th?

A. Yes, I did.

Q. Do you recall who initiated that phone call?

A. I believe he called me Tuesday evening.

Q. Do you recall what the purpose of his call was?

A. I think that he was calling to inquire just about, again, the general status and what we were doing relative to the trial that we thought was going to start the next morning and general information, just two lawyers talking.

Q. During the course of that conversation, Mr. Conger, did the subject of this letter, Plaintiffs' Exhibit 1, ever come [21] up?

A. No, it did not.

Q. Did Mr. Harker ever say anything to you during that conversation about any change in position in the settlement positions of his three clients?

A. No, he did not.

Q. Was there any discussion at all about any settlement at that point?

A. No.

Q. On March 25th and March 26th, did you receive any type of

Appendix III

written communications from Mr. Harker's office with respect to Plaintiffs' Exhibit 1, changing the effect or instructions in Exhibit 1?

A. No, sir.

Q. Did Mr. Schulcz hand you any handwritten notes that would address Plaintiffs' Exhibit 1?

A. No, he did not.

Q. On Wednesday March 27th, the parties appeared before Judge West for trial of what was left of the case; is that correct?

A. True.

Q. You were present?

A. I was present.

Q. So, I believe, was Mr. Schulcz?

A. Mr. Schulcz was here, yes.

Q. Mr. Condren was also present on behalf of Cook Paint; is

* * *

[Cross examination by Mr. Blackburn]

* * *

[46] Q. So it was as a result of a conversation on Monday that you

believed he didn't know of the letter on Monday. I apologize. But you heard Mr. Schulcz making this dispute, correct?

A. Yes.

Q. You didn't go and say, "Art, there is this letter, it exists," you didn't, right?

A. He knew the letter existed by then.

Q. You believed that Mr. Schulcz was merely mistaken when he said that the letter had previously been revoked, correct?

A. That's a fair way to characterize it. I think he was mistaken when he told the Court that, yes.

Q. You never stopped, though, to go check with Mr. Harker, Jones-Blair, O'Brien, to see whether or not he was mistaken, did you?

A. No, I didn't think I needed to under the circumstances.

Q. What circumstances were those?

A. The fact that I had had numerous conversations with Tim Harker, who I perceived and I believed clearly was the lead counsel in this matter; the fact that I had had a conversation [47] with him as late as the evening before the 27th and that there was no mention made of it; the fact that we spent probably in excess of two hours to three hours, either in this courtroom or in the Court's chambers or out in the hall, and if he was going to countermand these, he had every opportunity, in my view, to do it.

I think under all of those circumstances, that I felt that I didn't need to recontact Mr. Harker. Furthermore, it was my belief at this time that a settlement had taken place, because Cook Paint had settled.

Q. But you knew that you were the one that held the authority under Plaintiffs' Exhibit 1 to settle on behalf of Jones-Blair and O'Brien, correct?

A. Yes. I had conveyed these conditions to the HSC prior to that point in time. I think it is my view — if I can describe it this way — that once Cook Paint settled, then it is self-executing. Based upon this letter, the conditions were met, in my view.

Q. The subject of Plaintiffs' Exhibit 1 never came up in your conversation with Mr. Harker on the 26th, did it?

A. That's right.

* * *

[55] THE COURT: Redirect, if any.

MR. ROARK: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. ROARK:

Q. You stated this letter was no secret, at least as of Wednesday, March 27th, the conditions and terms of this letter was no secret?

A. That's true.

Appendix III

Q. Did you perceive that the instructions to this letter, even though they were addressed to you, were confined to you and only you?

A. No.

Q. Did you perceive that letter to also advise you that Cook Paint was going to be negotiating with the HSC?

A. Yes.

Q. That Cook Paint would be aware of that position. You certainly assumed that, did you not?

A. I assumed it and I know that they were.

MR. BLACKBURN: Objection. Mr. Conger is a bright, articulate man and he can testify.

THE COURT: Overruled.

Q. This agitated conversation that you referred to in the hallway where Mr. Schulcz and Ms. Bunn and Mr. Condren were discussing the negotiations and advised you of some dispute, at that point in time was it your understanding that the HSC [56] and Cook Paint had already reached an agreement, and Mr. Schulcz was making his objection known then?

A. That's my understanding.

Q. When you talked to Mr. Tomlinson, or talked to me later in the day, that morning on the 27th, and made some reference about Jones-Blair and O'Brien's objection, that was immediately

before the parties were getting ready to go back in chambers to make the statements on the record, isn't that correct, is that your recollection?

A. I really do not recall precisely when I made that — had that discussion with either you or Bob Tomlinson.

Q. Okay.

A. I have no reason to believe that it wasn't beforehand, but I'm telling you I don't recall exactly.

Q. The statements and the transcript that Counsel went over with you where Mr. Schulcz was making his comments about on instructions from Mr. Harker, and so forth, and so on, and how he had been told to preserve the right to settle, and so forth — I mean, to try the case, this on-the-record conversation occurred after the off-the-record conversation?

A. Yes.

Q. In the off-the-record meeting with the Court, the Court had already indicated, based upon what it had heard, that it intended to rule and find that there was a settlement agreement; isn't that correct?

A. That was my understanding when we went on the record.

[Testimony by Christopher Condren
Direct examination by Mr. Roark]

* * *

[62] Q. During those days, March 25th, March 26th, was Mr. Art Schulcz present in Oklahoma City?

Appendix III

A. He was.

Q. Were you in somewhat regular contact with him in person or by telephone while he was here and while you were also here getting ready for trial?

A. Some.

Q. In fact, I think at one point did you offer Mr. Schulcz the opportunity to come to your office?

A. Yes, I was hoping to get Mr. Schulcz to come to my office to work, because I wanted Mr. Conger to be able to give his uninterrupted attention to preparation of the defense of the case. We were all thinking the case was going to trial and I knew that some of the thoughts that Mr. Schulcz diverged from what Mr. Conger had. I wanted to get Mr. Schulcz in our library and provide him with our secretarial support staff so that it wouldn't in any way put any extra burden, or divert Mr. Conger and his staff's attention from the task at hand.

Q. During the time that you had contact, interaction with Mr. Schulcz on the 25th and the 26th, did the subject of this letter ever come up?

A. No.

Q. Did Mr. Schulcz ever make any statements to you whatsoever [63] on those two days with respect to the settlement positions or any change in settlement positions of Cook Paint, vis-a-vis Jones-Blair and O'Brien?

A. No.

Appendix III

Q. Did you have any communications with Mr. Harker on the 25th or 26th?

A. I don't believe so.

Q. Now, let me ask you to look down in the lower left-hand corner of that letter where it shows who copies were sent to.

A. Yes, sir.

Q. The last name, Mr. Pat Curran?

A. His name appears on that letter.

Q. Who is he?

A. Mr. Curran is either the president or the chief executive officer of Cook Paint & Varnish Company. I believe him to be the head man there. I don't know precisely what his title is there, but I think he is the number one man at Cook Paint, but I don't know his precise title.

Q. When did you become aware, Mr. Condren, that the settlement between the HSC and Cook Paint would be tied to a settlement with Jones-Blair and O'Brien?

A. Well, on Monday and Tuesday, I believed that would likely happen. On Wednesday, it became a reality, Wednesday morning as we were discussing the settlement.

* * *

Q. [65] So when you went to Court on Wednesday morning,

Appendix III

March [66] 27th, you believed that those settlements — the only real way the case was going to settle is if all three of these settlements were tied together, correct?

A. I thought that was going to happen.

Q. You were aware of the letter in front of you, Plaintiffs' Exhibit 1, correct?

A. Mr. Conger had talked to me over the phone and given me the precise details of this letter, including the fact that it had gone to Mr. Curran.

Q. What role or effect did this letter have in your thought process during the negotiations, the beginning of the negotiations, on Wednesday, March 27th?

A. Well, it was just felt to me, in my own mind, that Cook Paint was the focus of the entire proceeding; that whatever Cook Paint was going to do, would be either continue the case and have a trial, which I was fully expecting we were going to have a trial that morning when we showed up, or Cook Paint would settle the matter. That's the way I felt based upon this letter.

* * *

[68] Then the HSC came, and through a concession to Cook Paint, which Mr. Charles Whelen, an attorney in Dallas, advised [69] me would be coming, that basically if we would settle everything, the HSC would knock down our volume that would save Cook Paint and its insurance carrier $50 to $60,000. I had been told that was coming, to expect that during negotiations and that came in.

Appendix III

I think you are the one that came in and said, "Why should we just settle, let's talk about settling the whole thing. We'll reduce your volume 5 to 7,000 gallons and that will save you $50 or $60,000."

Kathy Bunn made the calls to the various people to decide if Cook Paint wanted to do that, Cook Paint's carriers would do that. A decision was made that we would do that.

Q. So at that point during the negotiations, you reached an agreement with the Hardage Steering Committee on a number —

A. On a number.

Q. — to do the global settlement?

A. On a number to do the global settlement. That's when, I recall, that approximately during that time, you also — I believe it was you, Mr. Roark — told us that, "We'll do this deal, but you have to bring Jones-Blair and O'Brien along with you, because it is just as expensive for us to try the case against two of you as it is three of you."

Q. What was your response to that?

A. We could do that, because we have got this letter of March 22, 1991, where they had hitched their cart to our wagon. [70] That's essentially what I told you, is that they had agreed to that.

Q. At that point, the point that you reached the agreement with HSC and the number, did you believe that there was a settlement between Cook Paint and the HSC?

A. Yeah, I would just have to go tell Mr. Schulcz.

Q. Mr. Schulcz, I take it, was not involved in the negotiations that you have described between Cook Paint and the HSC and while Cook was talking to its insurance company?

A. No, he was not. He had — when we first talked about settling the response cost issue, he came out. When Kathy Bunn and I came out of Judge West's chambers, we went out in the hall. He came — said, "What are you talking about?" I said, "We are talking about a way to try to get the problem settled." We said, you know, "We are going to try to settle this allo — this response cost issue." He was upset that we were talking settlement at that point.

Q. Why did you — why did you perceive that he was upset about that?

A. He was really eager to go to trial. I think personally he wanted to try this case.

Q. Just personally as the lawyer involved?

A. I think he was upset, as any trial lawyer would be that has worked very hard getting ready for trial, that the case is going to be settled.

[71] Q. Did he ever say anything to you in that conversation that you just described, that initial statement, about the letter in front of you, one way or the other; whether it existed or whether it was any good?

A. The letter was never mentioned to Mr. Schulcz until I told him we were going to settle.

Q. After you had already reached an agreement?

A. After we reached agreement with the HSC and we went down from the elevators toward Judge Phillips, had a heated discussion. I said, "We have this letter; we are going to settle." He said, "The letter is no good." I said, "You just watch."

We went back to Judge West. Judge West was involved, and had a discussion, Mr. Conger was there, and I agreed with Mr. Conger's version of events. Judge West advised us that he was inclined to enforce the settlement, but he would want to do it on the record and give everyone a chance to have their say. Everyone had their say on the record and settlement was enforced.

Q. When he made the statement to you that the letter was no good, was that the first notice that you ever received from Mr. Schulcz where he even mentioned the letter or some change in position?

A. That's the first time that Mr. Schulcz and I had ever discussed anything with respect to the letter and the first [72] indication that I had had that Jones-Blair and O'Brien were maintaining that the letter was not valid.

* * *

[74] Q. Were you the lead — is it fair to say that you were the lead negotiator on Cook Paint's behalf with the HSC that morning, on the 27th?

A. That morning, yes.

Q. I would like to know from your standpoint in that role what

reliance did you place on the letter in front of you, Plaintiffs' Exhibit 1, when you began negotiations on the morning of the 27th?

A. Cook Paint was the target at that point. Cook Paint could, on its own, settle the balance of the case. That is the position I felt we had going in, that Cook Paint could control the destiny of the litigation. If we were forced to try to bring people along, as we ultimately were, we could. That's the way I felt that the — that's the way I felt during those negotiations, is that we had control of our own destiny. If there were any other conditions, such as being tied to make the other two settle, we could.

Q. How did you regard Mr. Schulcz's attempt that morning to repudiate the terms of that letter?

A. A day late, a dollar short; after the fact, that's how I regarded it. It was after the fact. From my prospective, it was after the fact. I agree with Mr. Conger that it is self-execution. Once the settlement was done by Cook Paint, Jones-Blair and O'Brien's decision was made.

* * *

[Testimony of Timothy L. Harker
Cross examination by Mr. Roark]

Q. Let's talk about the week of March 18th. Do you recall what transpired in connection with this matter during that week?

A. March 18th, I believe, is a Monday. Mr. Schulcz came to me on that Monday and said that Mr. Conger had just called Mr. Schulcz to report to him that there was a global settlement offer on the street from the Hardage Steering Committee for the de

minimis parties of a dollar a gallon and a separate and different offer for the non-de minimis parties, which I think would total up to approximately $600,000 for Cook Paint.

* * *

[136] Q. You are not disavowing today what that letter says, are you, sir?

A. If you read the letter to convey my intention, I don't disavow it. If you read it to convey what other people say they believe it meant, I certainly disavow that contention.

Q. That's not my question.

A. Rephrase it again, please.

Q. I think it was clear, let me try it again.

You are not disavowing your own handiwork there in Exhibit 1, are you, sir?

A. I'm not disavowing this letter.

Q. You wrote it, it says what you wanted it to say?

A. That's correct.

Q. It doesn't say anything in there about if Cook Paint settles, Mr. Conger, then somebody will tell you and then you can go settle on behalf of Jones-Blair and O'Brien, it doesn't say anything like that?

Appendix III

A. In hindsight, it perhaps could say more; it doesn't say that.

Q. Thank you.

Now, you wrote — sent a copy of that to Mr. Curran, he is your client representative for Cook Paint, correct?

A. As I testified.

* * *

[143] Q. Okay. Did you tell Mr. Schulcz at some point early on that you would convey to Mr. Conger the change in position in Cook Paint, the change in position in that letter, Exhibit 1?

A. When I had talked to Mr. Schulcz on Monday morning, the 25th, indicated to him that Jones-Blair and O'Brien were going to proceed, irrespective of Cook Paint's decision with their insurance carrier, I intended to talk to Mr. Conger about his trial preparation. I believe I made some comment to Mr. Schulcz to the effect that if I talked to Mr. Conger, I will communicate that to him, but — may I finish? I'm not finished.

Q. I think it is a "yes" or "no" answer. I think you answered it.

A. I didn't complete my answer, but if that's what you wish.

Q. Sir, did you — you never had a conversation with Mr. Conger, did you, conveying to him a change in position in Exhibit 1?

A. No, I did not, because Mr. Schulcz had that conversation.

Q. Well —

Appendix III

A. Was in his office when he had it.

[144] Q. You weren't present when Mr. Schulcz was allegedly talking to Mr. Conger, were you, on that Monday morning or Monday?

A. Was I in Oklahoma City, no, Mr. Schulcz was.

Q. You have no personal knowledge whether Mr. Schulcz had that conversation with Mr. Conger or not, do you?

A. I have only the knowledge that Mr. Schulcz promptly, after I had told him to convey that message to Mr. Conger, called me back and said that the message had been delivered.

Q. You don't know precisely what Mr. Schulcz told Mr. Conger, the conversation that he was referring to?

A. Not precisely; I do know what Mr. Schulcz told me.

Q. You don't have any personal knowledge about what was said by either gentlemen at this brief meeting they had on the 25th, do you?

A. Since I wasn't there, of course not.

Q. You didn't see fit to write Mr. Conger a letter on March 25th to revoke the authority of that March 22nd letter, did you, Mr. Harker?

A. I didn't write him a letter.

Q. It was important enough for you to put it in writing on the preceding Friday on March 22nd, wasn't it?

Appendix III

A. Given the time pressure of the weekend and late Friday afternoon and the trial starting Monday morning and Akzo's decision to settle promptly and given Mr. Schulcz's statement and my directions to him, that he would tell Mr. Conger, who [145] was just down the hall, it was not necessary to put it in writing.

Q. Mr. Schulcz was in Mr. Conger's office when you spoke with him on March 25th?

A. That's correct.

Q. It would have been an easy matter to simply ask Mr. Schulcz to put Mr. Conger on the phone for you to talk to him directly, wouldn't it?

A. I don't know if that would have been logistically easy or logistically difficult. It was unnecessary; Mr. Schulcz was the spokesperson of the clients on the scene.

Q. You didn't ask to talk to Mr. Conger, did you?

A. I didn't call his firm and ask to talk to him that day. I did the next day. I indicated to Mr. Schulcz that I might be talking to him. If I did, I would also communicate to him that day, but that Mr. Schulcz should nevertheless go ahead and convey the message. After Mr. Schulcz told me he had conveyed the message, I did not further communicate with Mr. Conger.

Q. You did talk to him on the 26th, you said?

A. About trial preparation.

Q. You admitted very candidly that you had absolutely no

conversation with him whatsoever about this letter of March 22, correct?

A. That's correct.

* * *

APPENDIX IV — MOTION FOR RECUSAL FILED FEBRUARY 25, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-86-1401 P
(Appeal No. 91-6186)

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROYAL N. HARDAGE, et al.,

Defendants.

ADVANCE CHEMICAL COMPANY, et al.,

Hardage Steering Committee
Defendants and Third-Party Plaintiffs,

v.

ABCO, INC., et al.,

Third-Party Defendants.

28 U.S.C. § 455 MOTION FOR RECUSAL

The O'Brien Corp. ("O'Brien") and the Jones-Blair Co. ("Jones-Blair") hereby move under the provisions of 28 U.S.C. §455(a) that the Honorable Lee West of the U.S. District Court for the Western District of Oklahoma recuse himself from the further proceedings in this matter. This motion is based on the following series of actions and inactions by Judge West that cast doubt on

his impartiality towards O'Brien and Jones-Blair.

a. In ordering a settlement by O'Brien and Jones-Blair over the objection by their attorney who was present before the court, Judge West said, "The Court is not about to undertake a trial of this magnitude and size on behalf of two *de minimis* parties." Transcript, 3/27/92 hearing, p. 22 (Exhibit A).

b. Prior to ordering O'Brien and Jones-Blair to settle, the District Court in *United States v. Hardage*, 750 F.Supp. 1460, 1515-19 (W.D. Okla. 1990) (the "Hardage Remedy Trial"), had denied the majority of the HSC's $9.5 million response cost claims against the United States because the claims were for non-recoverable expenses related to litigation and were not consistent with the National Contingency Plan ("NCP").[1] *Id.* O'Brien and Jones-Blair (and other third-party defendants) then filed three timely, fully briefed dispositive motions for the court to dispose of the Hardage Steering Committee's ("HSC") response cost claims against "O'Brien and Jones-Blair by relying on the ruling and result of the district court's judgment rejecting the HSC's response cost claims against the United States. Judge West failed to rule on any of the three dispositive motions, thereby forcing the matter to trial; yet, on the day of trial, Judge West ordered O'Brien and Jones-Blair to settle on terms that were offered by the HSC but were unacceptable to O'Brien and Jones-Blair.

1. On September 25, 1991, O'Brien and Jones-Blair (and all third-party defendants) moved for partial summary judgment on the amount of the HSC's response cost claims, arguing that the trial court's decision approving only $3,716,695 of the $9.5 million HSC claim had made the

---

1. The Tenth Circuit recently affirmed that decision on December 21, 1992, Appeal No. 90-6325. The HSC has requested rehearing en banc.

issue of the HSC's response costs *res judicata*. Doc. No. ("Doc.") 3683, 3699, 3732, 3706 (Vapor Extraction Group Defendants).

2. On October 12, 1990, O'Brien and Jones-Blair also moved for partial summary judgment on the HSC's response cost claim based on the collateral estoppel (issue preclusion) arising from the district court's examination of the HSC's response cost claims against the United States and rejection of the majority thereof, and deposition testimony from the HSC showing that the claims against third party defendants were the same as those made against the United States. *See* Doc. 3911-12.

3. On January 7, 1991, O'Brien and Jones-Blair (and the third-party defendants) made another motion for partial summary judgment on the grounds that the HSC's response cost claim, except for the amount approved by the district court in the Remedy Trial (750 F.Supp. at 1519 failed to meet the requirements of the NCP and was not recoverable. Doc. 6153, 6154.

C. Judge West also failed to rule on two other dispositive motions filed by O'Brien and Jones-Blair: (1) reconsideration of the court's 9/22/89 decision allowing the HSC's claims to survive the CERCLA § 122(g), 42 U.S.C. § 9622(g), *de minimis* settlement which O'Brien and Jones-Blair had signed with the United States; and (2) dismissal of the HSC's response cost claims as a sanction for misrepresentation before the Court at the 9/22/89 hearing.[2] *See* Doc. 3928, 3947 (Order allowing filing of brief).

---

2. When asked by the Court the size of its response cost claim against the *de*

(Cont'd)

Appendix IV

d. On March 27, 1991, in explaining why the Court was ordering settlement and would not allow O'Brien and Jones-Blair to have a trial, Judge West said, "Costs would very quickly exceed any amount in controversy as between them and certainly exceed any differences in their position now from the time that that was stated." Tr. 3/27/91 at 22. Had the court ruled on the pending dispositive motions, the trial might well have been vastly reduced in scope or completely eliminated.

The Tenth Circuit has recently ordered the District Court to conduct a hearing concerning whether on March 27, 1991, when Judge West imposed a settlement, liaison counsel had authority to settle on behalf of O'Brien and Jones-Blair. The decisions and actions above appear to evidence either a disregard for the rights of O'Brien and Jones-Blair to an impartial adjudication of their claims under the law, a prejudgment against the merits of their claims, or a bias against them and for the HSC. Consequently, O'Brien and Jones-Blair "harbor doubts about [Judge West's] impartiality", *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987), in such a hearing, and for these reasons and as explained more fully in the accompanying memorandum respectfully request that Judge West recuse himself from this case.

Respectfully submitted,

s/ Arthur A. Schulcz, Sr.
Arthur A. Schulcz, Sr.

(Cont'd)
minimis parties, the HSC said it was the same as their claim against the United States, about $10 million. Tr. 9/22/89 at 51. However, shortly thereafter, the HSC asserted response cost claim of $34 million and then $55 million ($34 million plus a "free rider" penalty).

Appendix IV

THE HARKER FIRM
5301 Wisconsin Avenue, N.W.
Suite 740
Washington, D.C. 20015
(202) 966-7900

Dated: February 24, 1993